No.90 - 978 (4)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MELODY PERKINS, Petitioner

vs.

GENERAL MOTORS CORPORATION, Respondent

MELODY PERKINS, Petitioner,

vs.

THOMAS SPIVEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

Gwen G. Caranchini
Counsel of Record
3101 Broadway
Suite 420
Kansas City
Missouri 64111
(816) 931-2800

Robert K. Ball II
On Brief
1125 Grand Avenue
Suite 500
Kansas City
Missouri 64106
(816) 471-1060

ATTORNEYS FOR PETITIONER
MELODY PERKINS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MELODY PERKINS, Petitioner

vs.

GENERAL MOTORS CORPORATION, Respondent

MELODY PERKINS, Petitioner,

vs.

THOMAS SPIVEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

Petitioner Melody Perkins for her reply to Respondents' Opposition Briefs herein, respectfully submits the following:

OPINIONS BELOW

Respondents have urged that the District Court possesses power to correct

the errors which petitioner urges as grounds for this Court granting its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. This necessitates inclusion in this Reply Brief of the Mandate from the United State Court of Appeals for the Eighth Circuit (entered on October 1, 1990), which is reprinted as Appendix A-1 through A-4 hereto[1].

ADDITIONAL STATEMENT OF THE CASE

The facts recited in each of Respondents Briefs "Reasons for Denying the Writ/Petition" (Spivey Brief p. 6; G.M. Brief p. 8) are, contrary to the assertions made by each of the Respondents, matters of law which were

---

[1] Petitioner Melody Perkins' Motion for Stay of that Mandate, filed in the Eighth Circuit, is reproduced at Appendix B-1 hereto, and the order of the Eighth Circuit denying that Motion, entered on September 24, 1990, is reprinted at Appendix C-1 through C-2 hereto.

necessarily proffered, considered[2], *and decided* by the Eighth Circuit in concluding that a jury trial must be accorded Petitioner on her common law claim of negligent retention against Respondent GM, and in affirming the Title VII findings and the Judgment based upon collateral estoppel therefrom in *Spivey*. These issues were intended to be finally and forever concluded by the Court of Appeals, as is made manifest from it's Mandate (Appendix A). It is because of this that the injunction of *Lytle*, and the several other cases decided by this Court concerning the mandate of the

---

[2] The Eighth Circuit rejected the arguments proffered by Respondents, since it found that Petitioner had a right to try her negligent retention claim to a jury. It is because the controlling facts for that negligent retention claim against GM and the Title VII claim against GM, are identical in many respects, that the injunction of *Lytle* was violated by the decision of the Eighth Circuit in affirming those Tile VII findings and the giving of collateral estoppel effect thereto in *Spivey*.

Seventh Amendment (cited in Petitioner's Petition and on pp. 19-20 hereof), is violated by the Opinion and Mandate of the Court of Appeals.

Because Respondents' statements are not considered by Petitioner to be accurate, and Petitioner does not feel she can accept same and be bound thereby[3], Petitioner provides the following addendum to her Statement of the Case.

During trial of her Title VII claim, a male supervisor who worked with Petitioner testified he repeatedly asked Petitioner for a date and she repeatedly refused his advances. GM proffered no witnesses who claimed Petitioner had gone out on dates, or had sex, with men (other than Spivey) at any time. Spivey, when

---

[3] Rule 15 of the United State Supreme Court.

questioned by Petitioner's counsel during trial as to why he told no one of his "relationship" with Petitioner responded:

"Because I was afraid I would get caught by GM."

Although GM contends in this Court that Petitioner's employment with it has not been terminated[4], in response to interrogatories GM asserted she will not have a position in the new Fairfax plant upon the expiration of her disability leave[5].

GM also contends in this Court that the Kansas State Court found Petitioner suffered no physical injuries covered by the Kansas Workmen's Compensation Act[6].

---

[4] GM Brief, n. 3, p. 4.

[5] Petitioner is now receiving GM disability payments and social security disability payments.

[6] See GM Brief, n. 4, p. 4.

In fact the Kansas State Court found "there was no physical rape or even attempted rape of the claimant *on the premises of GM*", but only psychological injury on GM's premises; thus, because there was a lack of *physical injury on GM's premises* and further, because of *the intentional nature of the acts*, the claims were outside the Kansas Worker's Compensation Act.

Respondents' statements concerning Petitioner's (denied) Motion for Bifurcation fails to mention the reason why it was denied: *because the trial court agreed with GM that bifurcation would deny the Seventh Amendment Right to Trial by Jury because of the commonality of issues in Petitioner's Title VII with those in her negligence claim.*

Additionally, we suggest that

Respondent GM's failure to controvert *in any particular* the findings by the Eighth Circuit concerning the non waiver of the right to a jury trial of Petitioner's common law claim against GM (Petition, Appendix C 33-34), is inimical to their position in this Court that a waiver occurred.

REPLY TO BRIEF IN OPPOSITION

As we will hereafter demonstrate, despite GM's assertions to the contrary[7], when the Eighth Circuit issued it's Mandate affirming the Title VII Findings and the grant of summary judgment to Spivey on collateral estoppel grounds, it foreclosed any reconsideration by the District Court of either of those orders. *This, because there is absolutely no indication in*

---

[7] GM Brief, p. 8.

either the Mandate or the Opinion of the Eighth Circuit that the District Court could reconsider those orders if Petitioner prevails in a jury trial of her common law negligent retention claim (Petitioner's Reply Brief, Appendix A).

Petitioner claims that because she never *effectively* waived her right to trial by jury of her negligent retention claim against GM, or her claim against Spivey, that she cannot be precluded from pursuing those claims by trial to a jury. And the only way to give the required constitutional sanction to the findings from a trial by jury, is to set aside the Title VII findings and the judgment in favor of Spivey, *since neither of these judgments can constitutionally stand if contrary to the findings of a jury.* Despite argument to the contrary by both

Respondents, it is clear that the only reason the Title VII case was in fact tried to the court was because the trial court erroneously dismissed the negligent retention claim. If the trial court had not erroneously dismissed that negligent retention claim, the Title VII case would have been tried to a jury. This was held by the District Court at the behest of GM, because it denied Petitioner's Motion for Bifurcation (of the Title VII and negligence claim) on the grounds it would deny GM a jury trial on issues common to the Title VII and negligence claim. It is thus at best inaccurate to assert that Petitioner somehow waived her right to a jury trial by seeking bifurcation, *when GM admits that a jury trial would have occurred "but for" the dismissal of Petitioner's negligence claim!*

I.

The Mandate of The Court of Appeals Requires That the Title VII Findings of And Judgment In Spivey By the District Court Are Final And Govern All Proceedings In The Case, Absent Correction By The Writ Of Certiorari Of This Court.

Respondents Spivey and GM in their Briefs in this Court (Spivey Brief p. 7; GM Brief pp. 2-3, 8-14) urge that the Eighth Circuit did not hold that the Title VII Findings of the District Court remain *unaffected*, and that any decision concerning the finality of those Title VII Findings is not an issue ripe for adjudication. These arguments ignore the fact that the Court of Appeals MANDATE (Appendix A) requires exactly and unequivocally the opposite. That this MANDATE *must* be followed to the letter without variation by the District Court is settled hornbook law, *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2nd Cir.),

cert. denied 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1967)[8], *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674 (10th Cir. 1972)[9].

Thus, the arguments that the decision of the Court of Appeals for the Eighth Circuit does not prohibit the

---

[8] In *Banco*, the court stated (at p. 1798):

> "The Supreme Court mandate rule is nothing more than one specific application of a general doctrine appellate courts apply to their orders to lower courts, a doctrine commonly referred to as the law of the case."

[9] The Court in *Cherokee Nation* stated (at pp. 677-678):

> "The mandate to the district court was for further proceedings consistent with the Supreme Court decision. The opinion of the Court may be consulted to ascertain the intent of the mandate. *In re Sanford Fork and Tool Company*, 160 U.S. 247, 256, 16 S.Ct. 291, 40 L.Ed. 414. The Supreme Court decision is the law of the case. *Banco Nacional de Cuba v. Farr*, 2 Cir., 383 F.2d 166, 177-178 and cases therein cited, cert. denied 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151. The rule that a lower court must follow the decision of a higher court at an earlier state of the case applies to everything decided "either expressly or by necessary implication".

District Court from *reconsidering* the Title VII findings, should a jury resolve the issues contrary to those Title VII findings, or to *remove the collateral estoppel effect* given those findings in *Spivey*, is obliterated by the Mandate of the Eighth Circuit. Obviously, an application of the Mandate would compel the District Court to leave those findings undisturbed no matter what it decides on the Summary Judgment on the negligence claim, or no matter what a *jury* may decide thereon; likewise the mandate precludes any reconsideration by the District Court of the collateral estoppel judgment entered in *Spivey*. *Only the Writ of Certiorari of this Court may operate to avoid or correct these results*. Thus Petitioner's application for that Writ does not seek adjudication

of matters not ripe for review or matters that are left for resolution by the District Court.

II.
Rule 38 F.R.Civ.P. Governs Waiver Of The Seventh Amendment Right To Jury Trial And Absent A Waiver Under Rule 38 Petitioner Cannot Be Convicted Of Same.

Regarding Spivey (Spivey Brief pp. 7-8) and GM's (GM Brief pp. 14-16) second point that Petitioner is in no position to complain concerning denial of the Seventh Amendment Right to Jury Trial (Spivey Brief pp. 7-8), because Petitioner sought to waive that right in the District Court, we respectfully suggest that this Court has already decided who may waive the right to jury trial, and what is essential therefor, when it promulgated Rule 38[10]. If this

---

[10] **"Rule 38 Jury Trial of Right**
"(a) Right Preserved. The right of trial by jury as declared by the

(continued...)

Court had not promulgated Rule 38, then the issue of whether a party who unsuccessfully seeks to waive their Seventh Amendment Right to Jury Trial may

---

[10](...continued)
Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c) **Same: Specification of Issues.** In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

"(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. *A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.*"

thereafter complain about it's denial would still be a matter for resolution. However, as enabled by the Congress of United States, 28 U.S.C.A. § 2072[11],

---

[11] "§ 2072. Rules of civil procedure

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or

(continued...)

this Court promulgated Rule 38 which declares that the Seventh Amendment right to jury trial once in a case may not be waived by either party alone. We submit that the promulgation of such rule is in satisfaction of a substantive injunction contained in that act, to-wit:

> "Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

Moreover, even if the pertinent part of Rule 38 was not promulgated in

---

[11](...continued)
effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

satisfaction of this specific injunction in the Congressional Enabling Act, neither Spivey nor GM has made any effort at all to attack the validity of any part of Rule 38, and therefore neither of them is in any position to question the Rule or it's applicability herein: *not to mention the fact that it is GM's conduct which prevented the waiver which it now seeks to press.*

Since Rule 38 mandates the procedure to be followed for waiver of the Seventh Amendment right to jury trial, and, as determined by the Eighth Circuit, those provisions were not satisfied by Petitioner's earlier efforts at waiver, *Petitioner has the right to urge violation of the Seventh Amendment since it still remained in and governed the proceedings.* We therefore suggest that

since the right to jury trial may not be waived, except in the manner specified under Rule 38, that the Constitutional mandate of the Seventh Amendment remains in and governs the case, as mandated by Rule 38, and the violation of the Rule as a violation of the Seventh Amendment may be urged by either party. A Seventh Amendment violation is not independent of Rule 38, *Allen v. Matson Nav. Co.*, 255 F.2d 273 (9th Cir., 1958), as Spivey and GM would apparently have this Court decide.

With regard to the balance of the arguments by GM under point II of its Brief (pp. 14-16), to the effect that Petitioner should be held to a waiver because of her conduct herein, a reading of the cases cited will reveal that in none of them was a finding made that Rule

38 governed and precluded an *effective* waiver. Rather in each of those cited cases the party waiving the right had either taken affirmative steps to do so and submitted the matter to bench trial, or submitted the matter to a bench trial without objection. Nowhere does Respondent GM distinguish the clear holdings by this Court (cited and discussed in Petitioner's Petition for Writ of Certiorari) that one may not be held to a waiver of the right to jury trial where the District Court erroneously denies the claim on which a jury trial was required to be had, then proceeds to a bench trial of the remaining claim, or erroneously proceeds to a bench trial of the claim on which a trial by jury was required, *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500

(1959), *Curtis v. Loether*, 415 U.S. 189 (1974), *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Lytle v. Household Mfg, Inc.*, 110 S. Ct. 1331 (1990).

Conclusion

Based on the authorities set forth in her Petition for Writ of Certiorari, Petitioner Melody Perkins prays the Court issue it's Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit ordering the relief requested in her Petition.

Respectfully submitted,

Gwen G. Caranchini
Counsel of Record
3101 Broadway
Suite 420
Kansas City,
Missouri 64111
(816) 931-2800

Robert K. Ball II
On Brief
1125 Grand Avenue
Suite 500
Kansas City,
Missouri 64106
(816) 471-1060

ATTORNEYS FOR PETITIONER
MELODY PERKINS

APPENDIX A
UNITED STATES COURT OF APPEALS
For the Eighth Circuit
MANDATE ISSUED 10/1/90

No. 89-1233WM

MELODY PERKINS, *
*
Appellant, *
*
v. *
*
THOMAS S. SPIVEY, *
*
Appellee. *

No. 89-2136WM

Melody Perkins, *
* Appeals
from Appellant, * the United
* States
v. * District
* Court for
General Motors * the Western
Corporation of * District of
America, * Missouri.
*
Appellee. *
*
* * * * * * * * * *
*
Melody Perkins, *
*
Appellant. *
*
v. *

General Motors Corporation of America, *
*
*
*
Appellee. *

89-2137

Melody Perkins, *
*
Appellee, *
*
v. *
*
Thomas S. Spivey, *
*
Appellant. *

JUDGMENT

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and argued by counsel.

It is hereby ordered and adjudged that the District Court's judgments in appeals No. 89-1833WM and 89-2137WM are affirmed in all respects.

It is further order and adjudged in appeal No. 89-2136WM that the district court's entry of judgment favor of General Motors on Perkins' Title VII claim is affirmed. The district court's entry of summary judgment in favor of General Motors on Perkins' claim that General Motors breached its duty under Kansas common law to maintain a workplace free from sexual harassment is affirmed in part and reversed in part, and that portion of the case is hereby remanded for further proceedings consistent with the opinion of this Court.

July 24, 1990

A true copy:

ATTEST:

CLERK, U.S. COURT OF APPEALS,

8TH CIRCUIT.

MANDATE ISSUED: 10/1/90

APPENDIX B

Appellant's Melody Perkins' Request

For Stay of the Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELODY PERKINS,	)	
	)	
Plaintiff,	)	Consolidated
vs.	)	Appeals
	)	No. 89-2136 WM
	)	(There are two
GENERAL MOTORS	)	separate GM cases
CORPORATION,	)	under this number)
	)	
Defendant.	)	
	)	
MELODY PERKINS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Consolidated
	)	Appeals
THOMAS SPIVEY,	)	No. 89-1833 WM
CORPORATION,	)	89-2137 WM
	)	
Defendant.	)	

APPELLANT'S MELODY PERKINS' REQUEST FOR STAY OF THE MANDATE

Comes now Melody Perkins, appellant herein, and requests this court pursuant to F.R. App. P. 41, stay the issuance of the mandate on the above captioned appeal for 30 days, pending application for certiorari by appellant to the United

States Supreme Court on the grounds and for the reasons that:

1. This Court issued the opinion of the panel on the above captioned appeals on July 21, 1990.

2. Appellant and Appellee General Motors thereafter filed a Petition for Rehearing and Suggestion for Rehearing en Banc on or about August 7, 1990.

3. On August 31, 1990 an order denying the Petitions for Rehearing and Suggestions for Rehearing en Banc filed by appellant and appellee General Motors was issued by this court.

4. That appellant is desirous of having the mandate stayed for 30 days so that she may petition the United States Supreme Court for certiorari.

WHEREFORE, appellant Perkins respectfully requests this court stay the

mandate pursuant to F.R. App. P. 41 for 30 days pending appellants filing of her Petition for Certiorari.

Respectfully submitted,

THE LAW OFFICES OF GWEN G. CARANCHINI,P.C.

By /s/

Gwen G. Caranchini
3101 Broadway, Suite 420
Kansas City, Missouri 64111
(816) 931-2800

ATTORNEYS FOR APPELLANT MELODY PERKINS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Request for Stay of the Mandate was mailed by Express Mail to the Clerk of the Eighth Circuit Court of Appeals on this 5th day of September, 1990, and copies were mailed by first class mail to the Honorable Judge Scott O. Wright, and the Honorable D. Brook Bartlett, Judges of the United States District Court for the District of Missouri and to Paul Scott Kelly, Gage & Tucker, 2345 Grand Avenue, Kansas City, Missouri 64105, attorneys of record for appellee that same date.

/s/
Gwen G. Caranchini

APPENDIX C

United States Court of Appeals
Denies Stay of Mandate

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

Nos. 89-1833/2137/2137WM

Melody Perkins,	*	
	*	Appeal from
Appellant/cross	*	the United States
appellee,	*	District Court for
	*	the Western
v.	*	Division of
	*	Missouri
Thomas S. Spivey,	*	
et al.,	*	
	*	
Appellant/	*	
cross-appellee.	*	

Appellant/cross-appellee Melody Perkins' motion for stay issuance of mandate has been considered by the court and is denied.

September 24, 1990

Ordered Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit